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Ralph D. Mawdsley J.D., Ph.D.

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STANDARD OF CARE FOR STUDENTS WITH DISABILITIES: THE INTERSECTION OF LIABILITY UNDER THE IDEA AND TORT THEORIES

*Ralph D. Mawdsley, J.D., Ph.D. **

INTRODUCTION

The responsibility of public schools to provide related services and appropriate placements for students with disabilities intersects with schools' obligation to protect students from harm.¹ Students with disabilities receiving special education services under the Individuals with Disabilities in Education Act (IDEA)² differ from the remainder of the public school population because the manner in which school officials interact with them is determined to a large extent by services and placement decisions reflected in a student's Individualized Education Program (IEP).³ Because the IEP can provide considerable details regarding a disabled student's needs and behaviors, the question becomes how that knowledge should affect a school's standard of care for those students. Indeed, do schools have a heightened standard of care to assure the safety of fragile students as well as protecting students in general from those with behavior disorders? The answers are not simple. The interface between the IDEA and tort liability standard of care has never been clear and courts have been somewhat cautious about using the language of an

*Ralph D. Mawdsley, J.D., Ph.D. is Professor and the Roslyn Z. Wolf Endowed Chair in Urban Educational Leadership at Cleveland State University, Cleveland, Ohio.

1. This article represents an update of two earlier articles by the same author: Ralph D. Mawdsley, *Supervisory Standard of Care for Students With Disabilities*, 80 ED. LAW REP. 779 (1993); Ralph D. Mawdsley, *Standard of Care and Students with Disabilities*, 148 ED. LAW REP. 553 (2001). This article appears in 252 Education Law Reporter 527 (2010).

2. 20 U.S.C. § 1400 et seq.

3. For statutory obligations regarding the IEP, see 20 U.S.C. §§ 1414, 1415(d), (f).

IEP as the basis for a standard of care, if for no other reason than that a heightened standard of care being set for disabled students may not be the same for the majority of students who have no IEPs. Thus, in a large sense, does the heightened investment in resources and personnel attention required for students with disabilities under the IDEA also translate into a heightened standard of care if those students with disabilities are injured or cause injury to others?

This article explores issues of legal liability for school personnel where students with disabilities are injured in school settings or cause injuries to employees and other students in schools. While questions related to legal liability are varied, they tend to fall within two broad areas: standard of care relating to injuries to or by students; and, standard of care for employees working with students with or training others to work with students with disabilities. In both areas, the legal issue revolves around the concept of heightened standard of care, especially where framed by the language of students' IEPs. To what extent should injuries to, or caused by, students with disabilities be considered within the context of a heightened standard of care where an IEP reveals a student's propensity to cause injuries or to be vulnerable to injuries? Where services provided to students with severe disabilities as part of their IEPs have life-saving components to them (such as suctioning tracheotomy tubes⁴ or ambubag venting⁵), should the responsibility for providing those services or for training or supervising others to provide the services be assessed by a heightened standard of care?⁶

4. Clearing a tracheotomy tube is a routine procedure that occurs after an operation where a tube has been inserted in the throat to permit breathing. Indications that the tube needs to be suctioned in order to clean out mucous can include rattling mucus not cleared with coughing, fast rattling, bubbles of mucus at tracheotomy opening, fast, noisy, hard breathing, and dry, whistling sound. UNIVERSITY OF CINCINNATI ACADEMIC HEALTH CENTER, DEPARTMENT OF OTOLARYNGOLOGY, TRACHEOTOMY CARE HANDBOOK, [www.med.uc.edu/ent/documents/Tracheotomy Handbook.pdf](http://www.med.uc.edu/ent/documents/Tracheotomy%20Handbook.pdf) (last visited 6/7/09).

5. An ambu bag "is a compressible, self-inflating, non-rebreathing silicon bag, which has an inlet through which air and additional O₂ is supplied and an outlet through this can be transferred to the patient." Pediatric Oncall, www.pediatriconcall.com/fordocor/medical_equipment/ambu_bag.asp (last visited 6/16/09).

6. See *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984) (holding that school nurse's administration of clean intermittent catheterization (CIC) was not a medical service under IDEA, without reaching the question whether providing CIC constituted the practice of nursing, thus raising civil and criminal issues about the unauthorized

To facilitate an understanding of the issues relevant to students with disabilities and tort liability, this article will be divided into four parts: Part I discusses the U.S. Supreme Court's decision in *Cedar Rapids Community School District v. Garret F.*⁷ and how satisfying the IDEA's Least Restrictive Environment (LRE)⁸ requirement has been instrumental in shaping concern among educators about their own tort liability when students, especially students with disabilities, are injured; Part II presents case law that has framed tort liability standards under state common law and constitutional tort theories involving students with disabilities; Part III analyzes cases that have applied standards of care to specific educational settings involving injuries both to students with disabilities and injuries caused by such students; and, Part IV summarizes the status of the law and furnishes some guidelines for educational policy in protecting students with disabilities within the context of the requirements of the IDEA.

I. GARRET F., THE IDEA AND THE LIMITATION ON THE EXCLUSION OF STUDENTS WITH DISABILITIES FROM REGULAR EDUCATION

A. *Garret F.: The Responsibility to Educate and the Medical Services Exemption*

The IDEA assures that "[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled."⁹ The effect of this LRE requirement is that most students with disabilities will be included in regular classrooms and will be excluded only when

practice of nursing). See *Tatro v. State of Texas*, 703 F.2d 823, 828 (5th Cir. 1983).

7. 526 U.S. 66 (1999) (holding that continuous nursing services for quadriplegic student was a related service and not a medical service and student could not be excluded from regular classroom attendance solely because of the cost associated with providing that service).

8. 20 U.S.C. § (a)(5)(A) defines LRE as follows:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

9. 20 U.S.C. § 1412(a)(5)(A) (2006).

those school personnel responsible for designing a disabled student's IEP can furnish persuasive evidence that "the nature or severity of [a student's] disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."¹⁰

The IDEA requires that students eligible for special education receive related services that will allow them to receive "some educational benefit"¹¹ in the least restrictive environment.¹² The only exception is that school districts are not required to provide "medical services."¹³ However, the U.S. Supreme Court in *Garret F.*¹⁴ held that school personnel were required to provide a one-on-one nurse as a related service to a medically fragile student and that such a service did not fall within the IDEA's medical service exemption.¹⁵ As a result of *Garret F.*, students with even severe disabilities cannot be excluded from public schools and regular classrooms within those schools solely based on the nature and expense of related services. *Garret F.* has prompted an awareness by school personnel of an increased level of responsibility for the safety of these fragile students.¹⁶ In addition, the inclusion of students

10. 34 C.F.R. § 300.114 (a)(2)(ii). 34 C.F.R. § 300.116(a)(1) and (2) provide that "[t]he placement decision-- (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and (2) Is made in conformity with the LRE provisions."

11. Board of Educ. of Hendrick Hudson Central School Dist. v. Rowley, 458 U.S. 176, 200 (1982).

12. 20 U.S.C. § 1401(26)(A) (2006).

13. 20 U.S.C. § 1401(26)(A) (2006). However, related services include medical services that are for "diagnostic and evaluation purposes only." *Id.*

14. 526 U.S. 66 (1999) (holding that continuous nursing services for quadriplegic student was a related service and not a medical service and student could not be excluded from regular classroom attendance solely because of the cost associated with providing that service).

15. *Garret F.* resolved a conflict between federal circuits as to whether providing nonintermittent, full-time nursing services was a "medical service" under IDEA. See 20 U.S.C. § 1401(26)(A) (limiting "medical services" to "diagnostic and evaluation purposes only"). Compare Granite Sch. Dist. v. Shannon M., 787 F. Supp. 1020 (D. Utah 1992) (nonintermittent nursing services to suction tracheotomy tube and feed student through nasogastric tube was a medical service, in part because the \$30,000 cost for a nurse for one student was excessive, given the limited nursing services available to nondisabled students) with Dep't of Educ. of Hawaii v. Katherine D., 531 F. Supp. 517 (D. Haw. 1982), *aff'd*, 727 F.2d 809 (9th Cir. 1983) (providing a person to suction a tracheotomy tube not a medical service under IDEA, in part because lay persons could be trained to provide the service).

16. See e.g., Rossetti v. Bd. of Educ. of Schalmont Cent. High Sch., 716 N.Y.S.2d 460 (N.Y. App. Div. 2000) (A post-*Garret F.* case raising liability of teacher's aide in diapering seven years old spastic quadriplegic student who was unable to walk or

with emotional disabilities in regular education programs has made school officials potentially responsible for harm to other persons both within¹⁷ and outside school settings.¹⁸

1. The IDEA's Commitment to Providing Special Education Services to Students in the Least Restrictive Environment (LRE): Requirements and Limitations

Because the IDEA assures that “[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled,”¹⁹ school districts bear the burden of not only including even severely disabled students in the regular classroom, but of assuring that such can be accomplished without unreasonable risk to those students or to other nondisabled students in the schools. However, in order for students to be eligible for services under the IDEA they must meet age standards,²⁰ have a condition listed in the statute,²¹ and by reason of the condition, need “special education and related services.”²² To a large extent, school officials’ concern about tort liability resulting from injuries to special education students, as opposed to those students without disabilities, reflects the responsibilities imposed on school districts under the IDEA. One fundamental difference is that a school’s responsibilities for students with disabilities are

speak and who spent the majority of his waking hours confined to a wheelchair).

17. See *J.N. ex rel. Hager v. Bellingham Sch. Dist.* No. 501, 871 P.2d 1106 (Wash. Ct. App. 1994) (reversing trial court’s grant of summary judgment to school district as to sexual assaults by fourth grade student diagnosed as severely behaviorally disabled against first grade student during school recess).

18. See *Thomas v. City Lights, Inc.*, 124 F.Supp.2d 707 (D.D.C. 2000) (in refusing to dismiss complaint against an alternative school for assault on plaintiff by five of its students while on a field trip to a zoo, a federal district court indicated that defendant could be liable under a Restatement of Torts standard whereby “[o]ne who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.” RESTATEMENT (SECOND) OF TORTS § 319 (1965)).

19. 20 U.S.C. § 1412(a)(5)(A)(2006).

20. The age range is three through twenty-one, 20 U.S.C. § 1412(a)(1)(B), although children within the age range are no longer covered once they have received a regular high school diploma. 34 C.F.R. § 300.102(a)(3)(i).

21. 20 U.S.C. § 1401(3)(A)(i) “mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities.”

22. 20 U.S.C. § 1401(3)(A)(ii)(2006).

set forth in an IEP, a contractual document with a designation of a disability or disabilities, long-term and short-term goals, and specified services that is negotiated, and reviewed at least annually, by parents and school personnel.²³ The identification of both a disability and the services necessary to permit a student to receive educational benefit makes a student with an IEP unique in the sense that those working with that student are aware of risks that the disabled student may pose to other students or of risks that may be faced by the disabled student where his or her services are inadequately or incorrectly provided. A second difference is that a student with an IEP that specifies special education nursing services may be receiving a related service²⁴ not readily available on a regular basis to students without disabilities.²⁵ For example, even if full-time nurses are not be available on a regular basis to provide IEP nursing services as required in a student's IEP, for reasons such as cost or a shortage of nurses in the area, those services, nonetheless, will still have to be provided even if by school nurse-trained non-nursing personnel.²⁶ As a result, the

23. 20 U.S.C. § 1414 sets forth the timeline for preparing an IEP, the content areas within the IEP, the constituency of the IEP team that drafts the IEP, and the process for review and change of the IEP. *See generally*, MARK WEBER, RALPH MAWDSLEY, & SARAH REDFIELD, *SPECIAL EDUCATION LAW AND MATERIALS: CASES AND MATERIALS* 209-241 (LEXIS NEXIS 2007) for a comprehensive discussion of the IDEA's requirements concerning development and implementation of the IEP.

24. "Related services" are given an expansive definition in IDEA federal regulations:

Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training.

34 C.F.R. § 300.34(a).

25. *See* Vida Svarcas, *The Role and Utilization of Nurses in Ohio's Schools* (Unpublished Ph.D. dissertation, Cleveland State University,) (indicating in Ohio the high student-nurse ratio, the lack of nurse presence in most public schools on a regular, daily basis, and the pattern of public school assignment of nurses to functions other than nursing). *See also*, *Garret F.*, 526 U.S. 66 (1999) (holding that the exclusion of "medical services" as a related service under the IDEA did not apply to nursing services); 34 C.F.R. § 300.34(c)(5) (medical services "means services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services").

26. *See* *Garret F.*, 526 U.S. at 77 ("[20 U.S.C.] § 1401(a)(17) does not employ cost in its definition of 'related services' or excluded 'medical services,[and] accepting the

question for school districts is the extent to which the provision of intensive and potentially lifesaving related services (such as nursing services), whether by nurses or nurse-trained public school non-nursing employees, serves to heighten their duty of care to the students with disabilities receiving those services. A third difference is that parents under the IDEA have a mandated, integral role in the process of formulating an IEP that permits them to challenge the school's program or placement for that IEP²⁷ by demanding an adversarial "due process hearing"²⁸ and they or the school district may appeal an adverse decision of the hearing officer to court, which may hear additional evidence in order to decide the case.²⁹ The extent to which parents should share in responsibility for their children's safety if they fail to furnish information that would be important in determining the level of services in a student's IEP has little judicial record but, arguably, parents who have provided incorrect information, or who have refused to consent to services that the school considers important for the student's health or safety should share some measure of responsibility.³⁰ While "the IDEA imposes an obligation on the School District to identify and evaluate children with disabilities,"³¹ parents may not be able to impose additional financial cost on a school district where they have failed to request IEP changes at an IEP meeting.³²

[School] District's cost-based standard as the sole test for determining the scope of the provision would require us to engage in judicial lawmaking without any guidance from Congress").

27. 20 U.S.C.A. § 1414(d) (2006).

28. See 20 U.S.C. § 1415 (2006) (setting forth a broad range of parents' procedural rights to challenge decisions regarding evaluation, related services, and placement, as well as entitlements to impartiality, participation in the hearing and a variety of remedies). 20 U.S.C.A. §§ 1415(f)-(i) provides that states may create a hearing review procedure that must be exhausted before the matter goes to court (§ 1415(g)) but while the due process hearing progresses the child will remain in the existing placement during the pendency of proceedings. § 1415(j).

29. 20 U.S.C. § 1415(i)(2)(A) (2006).

30. See *Clay City Consolidated Sch. Corp. v. Timberman*, 896 N.E.2d 1229 (Ind. Ct. App. 2008) (while not a special education case, a state appeals court held that a jury was entitled to be instructed as to a contributory negligence defense against parents suing a coach and a school district for negligence and wrongful death in the death of their son during a basketball practice where the parents had failed to provide medical information about the nature of their son's medical condition).

31. *Seattle Sch. Dist., No. 1 v. B.S.*, 82 F.3d 1493, 1497 (9th Cir. 1996) (emphasis added).

32. See *Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 87 (D.D.C. 2004) (in rejecting parents' request for reimbursement for unilateral placement of their child

II. TORT LIABILITY CASE LAW AND STANDARD OF CARE UNDER STATE COMMON LAW AND THE U.S. CONSTITUTION

A. Legal Theories for Recovery of Damages: Requirements and Limitations

School districts owe to their students a standard of care, at the minimum, determined under ordinary common law negligence, but in many states, state legislatures have lowered that standard under their governmental immunity statutes so that school personnel can be liable only where there is gross negligence or reckless or willful conduct.³³ However, whatever the standard of care, the legal analysis as to the burden of proof begins in the same place by examining whether a recognized duty was owed, whether a breach of that duty has occurred, whether the breach was the proximate cause of an injury, and whether that injury is one cognizable in the state. School districts have a duty to employ competent and proficient personnel, to adequately instruct and supervise students and employees, to provide safe facilities and equipment, and to make and enforce adequate rules. However, a determination as to whether a school district owes a duty to a student and whether that duty has been breached requires viewing the injury to a person through the filters of foreseeability and the reasonable person. The reasonable person takes on an injured student's age, education, and experience, as well as the student's familiarity with an activity and the difficulty or dangerousness of the activity. The task for the trier of fact is to determine whether the injury to the student with those characteristics was foreseeable.³⁴ As students mature

in a private school, a federal district court criticized, in colorful language, the parents for their failure to make their requests known: "Critical to the finding that Anna's parents' actions contributed to the inappropriateness of the Initial IEP is the dog that did not bark at the March 26, 2002 IEP meeting").

33. For a statutory definition of "willful and wanton misconduct," see 745 ILCS 10/1-210 where willful and wanton misconduct is defined as "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property." For a comprehensive discussion of the differences between ordinary and gross negligence/willful conduct, see Charles Russo and Ralph Mawdsley, EDUCATION LAW § 6.04[1], *Immunity* (New York: Law Journal Press 2009) discussing the impact of state governmental immunity on standard of care.

34. See e.g., *Hammond v. Bd. of Educ. of Carroll County*, 639 A.2d 223 [90 Ed. Law Rep. [256] (Md. Ct. App. 1994) (holding that school district had no duty to warn

physically and mentally and demonstrate improved skills and competency in dealing with situations posing greater risks of injury, these filters of reasonable person and foreseeability can be used by courts to adjust the standard of care owed by school districts to students.³⁵ For some students receiving special education services, though, the rate of change will not be the same as for typical students and, thus, the question becomes the extent to which a student's disability, diminished rate of change in skills, and diminished competencies will affect a school district's standard of care in providing adequate and appropriate personnel, rules, supervision, instruction, and safe premises and equipment.³⁶

While students with disabilities have a variety of legal remedies to correct inadequate or inappropriate treatment, including the nondiscrimination statutes section 504³⁷ and the Americans with Disabilities Act [ADA],³⁸ this article focuses

female student competing on football team and who suffered serious and permanent internal injuries of possible serious injury where participation was voluntary; while notice to parents that such injuries could result from playing football might be a good practice, the district had no duty to do so).

35. The classic case is *Cox v. Barnes*, 469 S.W.2d 61 (Ky. 1971) (finding a school district not liable for drowning death of a high school senior on a field trip where the student had attempted to swim to a diving tank 40 yards from shore with a clearly marked sign, "Off Limits," and where the court determined in part that a eighteen-year-old was old enough to read and obey signs). See also *Rixmann v. Somerset Pub. Sch.*, 266 N.W.2d 326, 333 (Wis. 1978) (holding that two students characterized by the court as "not the brightest" could not maintain their lawsuit against the school district for injuries incurred during a chemistry lab fire where their conduct did not "conform to that which would be expected of a similarly situated child of the same age and with the same capacity, discretion, knowledge and experience in creating the initial fire"); *Aaris v. Las Virgenes Unified Sch. Dist.*, 75 Cal. Rptr.2d 801 (Cal. Ct. App. 1998) (finding no negligence where student injured during practice of routine cheerleading gymnastic routine had been adequately instructed and the coach had not increased the level of difficulty from the routines that plaintiff had received instruction for and the routines being practiced).

36. See *Hammond*, *supra* note 33, at 226 (suggesting, without reaching a conclusion, that a duty to warn and supervise would have been different had plaintiff been "mentally deficient").

37. 29 U.S.C. § 794. Sec. 794, better known as § 504, is a vehicle for private damages claims and provides that:

No otherwise qualified individual with a disability in the United States ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance....

38. 42 U.S.C. §§ 12131-12132. The ADA overlaps § 504 but also extends nondiscrimination on the basis of disability to private sector organizations with slightly different variation on the nature of the protected class:

[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs,

primarily on state law tort claims framed in negligence, gross negligence, or willful and wanton conduct. Constitutional tort claims under section 1983 of the Civil Rights Act³⁹ remain a popular legal theory and are discussed briefly in order to highlight the differences in standard of proof between the state law negligence/gross negligence/willful conduct theories and constitutional theories.

B. Tort Claims under a State Common Law Standard of Care

Whether state claims are viable will depend in the first analysis on state governmental immunity statutes. Generally, these statutes exclude governmental entities, including school districts, from liability. However, these statutes permit liability if the conduct of governmental entities falls within certain categories specified within the statutes. These categories vary among states, but governmental entities may be liable for employee conduct where the conduct was willful and wanton⁴⁰ or where the conduct is considered to be ministerial (as opposed to discretionary) in nature.⁴¹ In many states, though, even if a

or activities of a public entity, or be subjected to discrimination by any such entity. For a discussion of the difference in the interpretation of §§ 504 and ADA, see *Baird v. Rose*, 192 F.3d 462 (4th Cir. 1999) (holding that the Title VII employment standard permitting causation to be proved where disability discrimination was a *motivating factor* in discriminatory conduct applied to ADA but not to § 504 which permitted a claim only when discriminatory conduct was *the sole basis* for such discrimination). Both § 504 and ADA are viable only to the extent that the facts involve discrimination. See *Allen v. Susquehanna Township Sch. Dist.*, 233 Fed. Appx. 149 (3d Cir. 2007) (upholding dismissal of parents' § 504 and ADA claims that the death of a student with an emotional disability who ran away from school and was killed in traffic allegedly resulted from the failure of school to appoint an escort failed to state a discrimination claim where no one had requested or prescribed an escort for him in his IEP).

39. 42 U.S.C. § 1983. Sec. 1983 creates no rights of its own, but is solely a vehicle to recover damages for violations of constitutional and federal statutory rights:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

40. See *Summers v. Slivinski*, 749 N.E.2d 854 (Ohio Ct. App. 2001) (remanding for trial as to whether cheerleader advisor's statements to an injured cheerleader concerning her performance of a specific routine constituted willful and wanton conduct that would fall within an exemption from the state's governmental immunity statute).

41. See *Babb v. Hamilton County Bd. Of Educ.*, No. E2004-00782-COA-R3-CV, 2004 WL 2094538 (Tenn. Ct. App. 2004) (holding that a school principal had exercised a discretionary function in readmitting a student with a disability who had struck a teacher and was suspended, and then had struck the teacher again after being readmitted, where the principal had to balance the risk of further injury to those in the

government employer is liable, the amount of damages recoverable from the employer can be limited by statute to a certain maximum amount.⁴² Injured claimants must fit within one of these statutory exceptions to governmental immunity in order to recover damages.

In *Stiff v. Eastern Illinois Area of Special Education*,⁴³ parents of an epileptic student injured while on a field trip sued the special education organization and the teachers under both negligence and willful and wanton misconduct counts for lack of adequate supervision. When seven years old, the student plaintiff along with seven other students with disabilities were taken on a hike in a state park accompanied by five professionals.⁴⁴ While attempting to cross a bridge by first passing under a tree limb that had fallen over the bridge, the student's leg buckled causing her to lose her balance and fall off the bridge, fracturing her femur. The state court of appeals upheld dismissal with prejudice of the student's negligence claim under the state's governmental immunity statute that permitted immunity where public school teachers had acted *in loco parentis* toward students. In this case, the court reasoned that the student's teachers, by conferring and discussing several possibilities of getting the student across the bridge before deciding that she would be able to maneuver under the fallen tree with a teacher a short distance in front of her, demonstrated the same kind of discretion and decision-making process that would be used by parents. The student also had sought liability within the state's governmental immunity statute by attempting to prove willful and wanton conduct by the teachers but the appeals court affirmed the trial

school against the student's stay put and manifestation hearing rights under the IDEA).

42. See *Larson v. Indep. Sch. Dist. No. 314*, 289 N.W.2d 112 (Minn. 1979) (regarding payment of paraplegic student's judgment in excess of \$1,000,000 against school district, PE teacher and school principal, school district responsible for only \$50,000 under governmental immunity statute setting school district minimum liability at \$50,000 where, in this case, the school district had provided only for that minimum amount of liability insurance coverage). See also *Tindley v. Salt Lake City Sch. Dist.*, 116 P.3d 295 [200 Ed. Law Rep. [406] (Utah 2005) (upholding statutory \$500,000 limit for damages related to one occurrence as reasonably related to a legitimate pedagogical concern).

43. 666 N.E.2d 343 [110 Ed. Law Rep. [1167] (Ill. App. Ct. 1996).

44. These professionals were the plaintiff's classroom teacher, adaptive physical education teacher, crisis interventionist, two teacher's assistants, and a student teacher. *Id.* at 344.

court's directed verdict for the teachers because they had displayed neither "an utter indifference toward or conscious disregard for [the student's] safety,"⁴⁵ the kind of conduct that would be required if the student were to establish willful and wanton conduct.

Worth noting in *Stiff* is that while the teachers prevailed in the negligence claim, they did so only because they were able to persuade the court that their conduct with respect to the student with disabilities represented the same level of care that the parents of that child would have displayed. Thus, the discussion that occurred among the teachers prior to attempting the crossing of the bridge as to the nature of the child's disability and her risk of injury was crucial to a finding of statutory immunity. Perhaps, if the teachers had attempted to cross the bridge without this discussion the court might have found that the teachers were not excluded from a negligence claim under the *in loco parentis* provision in the state's governmental immunity statute.

More recently, another Illinois appeals court, in *Mitchell v. Special Joint Agreement School District No. 208*,⁴⁶ determined that parents of an injured student with disabilities had failed to produce evidence of willful and wanton conduct in their damages claim against a school district. In *Mitchell*, a Down's Syndrome student who was profoundly mentally delayed, not able to speak, severely hearing impaired and requiring assistance with all of his daily functions, including meals, had close one-on-one supervision so as to prevent his eating too quickly and putting too much food in his mouth. The social age of the student in this case was 12 months, his academic age 11 months and his physical size 34 months. The school and staff were familiar with the plaintiff's specific needs related to food where he would stuff food too rapidly into his mouth requiring the intervention of his one-on-one aide to stop him from eating more food until he had chewed and swallowed the food in his mouth. While the student had never choked on food in the past prior to the incident in this case, the student had on several past occasions grabbed food from nearby trays or from other students and stuffed the food into his mouth, often swallowing it without chewing first. On the day during which the student's

45. *Stiff*, 666 N.E.2d at 346.

46. 897 N.E.2d 352 [238 Ed. Law Rep. [836] (Ill. App. Ct. 2008)].

injury occurred, the aide had served a cupcake to each student in the room, carefully cutting up the plaintiff's into small bites and, after distributing a cupcake to other students, one cupcake was left on a tray on the table. After eating his cupcake, the student was served cereal and, believing that the other students had finished their cupcakes and that the risk of the student's taking food from other students had passed, the classroom teacher sat at his desk completing an attendance form, leaving the supervision of the student to the aide. When the student spilled milk from his cereal on the table, the aide backed up several feet to grab a paper towel from a sink in the room to clean up the milk, but kept eye contact with the student at all times. However, while the aide was wetting a paper towel at the sink, the student grabbed the remaining cupcake, stuffed it into his mouth and disregarded the aide's order to stop. The student began to gag and choke and, despite the aide's response within seconds and administration of the Heimlich maneuver, the student had to be transported to a hospital where he remained in an induced coma for an indeterminate amount of time. After he awakened, he had some difficulty walking and incurred \$80,000 in medical expenses that were paid by public aid. The student's willful and wanton damages claim was premised on the theory that because the school was aware of his issues with food, taking even a few steps away from him at lunch demonstrated "a conscious disregard for his safety."⁴⁷ Relying on *Stiff*, the *Mitchell* appeals court affirmed the grant of summary judgment to defendants, observing that the "school staff [had] maintained close supervision over [the student], evincing concern for his safety."⁴⁸

However, worth noting is how the *Mitchell* court parsed the facts to find the absence of willful and wanton conduct. The court found three facts controlling:

Both the student's teacher and aide believed that the other students had finished their cupcakes and that the student would not be motivated to take food from others when he had his own cereal to finish;

Although the classroom teacher was seated at his desk, he had done so believing that the risk of the student's compulsive

47. *Id.* at 356.

48. *Id.* at 357.

behavior had passed once the plaintiff and other students had eaten their cupcakes and student was eating his cereal; and,

Being aware of the student's issues, the aide continued to maintain eye contact with student as she stepped back a few feet to the sink without turning her back on him.⁴⁹

The fact that does not come into play in this appeals court's analysis is how leaving the cupcake on the tray within easy reach of the student might have influenced the result in a different set of facts. To what extent would plaintiff's claim for willful conduct have withstood the school district's motion for summary judgment if the sink had been located farther across the room from the plaintiff or the aide had turned her back on the plaintiff when she walked to the sink?

On its face, *Mitchell* does not seem to have altered the test for determining willful misconduct, in the sense that the responsibility for school personnel to provide supervision of students is commensurate with their knowledge of student behavior. However, the nature of the supervision for a student with disabilities, such as the one in *Mitchell*, would seem to differ qualitatively from whatever supervision would be expected for a student without disabilities. The recording of the *Mitchell* student's behaviors in his IEP manifested a risk that was continuous, persistent and life threatening and, thus, mandated a duty to supervise commensurate with that risk. Notably missing in *Mitchell* was a written behavior intervention plan (BIP)⁵⁰ as part of his IEP, but for tort liability purposes that deficiency appears to have been compensated for by all of the school personnel's "aware[ness] of [plaintiff's] specific needs related to food"⁵¹ and their "common sense" approach to monitoring the plaintiff during meals.⁵² Thus, *Mitchell* reveals an anomaly that, while failure to comply with a requirement of the IDEA (designing a BIP) can constitute a violation of a free appropriate public education

49. *Id.*

50. A BIP is "a written document that outlines how the IEP team and others will try to intervene with environment and/or the student to alter problematic behaviors presented by a student and identified in the functional behavioral assessment." Mark Weber, Ralph Mawdsley and Sarah Redfield, SPECIAL EDUCATION LAW: CASES AND MATERIALS G-3 (Newark NJ: LEXIS NEXIS 2007). See 20 U.S.C. § 1415(k)(1)(D),(F); 34 C.F.R. § 300.503(f).

51. *Mitchell*, 897 N.E.2d at 354

52. *Id.* at 355.

(FAPE) under the IDEA,⁵³ it will not result in tort liability as long as the elements of standard of care have been addressed in some other manner.

C. Section 1983 Constitutional Tort Theory

An injured student also can pursue damages under a constitutional tort theory, essentially a claim that the injury resulted from school conduct depriving a student of a Fourteenth Amendment⁵⁴ right to life or liberty without due process of law. Constitutional tort liability is premised not on whether a school district has breached a common law duty of care, but whether a student injury was caused by a violation of a constitutional right under one or more of three theories - whether a school board had a special relationship with the injured student at the time of injury,⁵⁵ whether the injury was state-created,⁵⁶ or whether the board had a policy, custom, or practice of violating the rights of the student.⁵⁷ However, constitutional tort bears a kinship to common law tort liability in that courts must determine under either legal claim whether a breach of legal expectation (common law or constitutional) caused an injury.⁵⁸

In *Sargi v. Kent City Board of Education*,⁵⁹ a special

53. See *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022 (8th Cir. 2003) (failure of IEP to have BIP attached had denied student FAPE where, even though the student was making progress in meeting goals, his lack of a BIP with strategies and techniques to address his behavioral problems kept him out of the regular classroom).

54. U.S. CONST., amend. XIV, § 1 ("[No] State [can] deprive any person of life, liberty, or property, without due process of law").

55. See *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 198 (1989) (finding that student with disabilities being transported on school bus lacked special relationship).

56. See *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 70 F.3d 1364, 1373-74 (3d Cir. 1992) (school not liable under state created theory where it had not limited plaintiff's freedom to act or barred her access to outside help).

57. See *City of Canton v. Harris*, 489 U.S. 378, 388-89 (1989) (city can be liable for inadequate training of personnel only where such a lack was a custom and practice that demonstrated deliberate indifference).

58. See *Wyke v. Polk County Sch. Bd.*, 129 F.3d 560 (11th Cir. 1997) (reversing federal district court's denial of summary judgment as to plaintiffs' § 1983 claim that school had a constitutional duty to notify them that their son, who had emotional and behavioral problems, had twice attempted suicide at school, rejecting plaintiffs' claim that the school's failure to notify them had "affirmatively prevented" them from saving their child's life, and asserting that compulsory school attendance laws alone are not a "restraint of personal liberty" sufficient to give rise to an affirmative duty of protection).

59. 70 F.3d 907 (6th Cir. 1995).

education student who suffered from a seizure disorder and Q.T. Syndrome, a heart condition, collapsed from heart failure while being taken home on one of the buses owned by the Board of Education. When the student collapsed, the bus driver attempted to contact his supervisor on a C.B. channel but was unable to do so because the equipment was faulty. However, believing that that the student was having only a seizure the school bus driver thought that medical attention was unnecessary and continued to take the other children who were on the bus to their homes. At one of the stops, a neighbor approached with a portable phone, at which time the bus driver contacted the bus garage and told the secretary to contact the student's mother. By the time the bus reached the student's home, the student was not breathing and he fell into a coma and died three days later.

The mother brought claims under a constitutional tort theory that the school board, its Transportation Coordinator, and its Business Manager, all of whom allegedly knew of the student's disabling condition had failed to maintain adequate policies, rules, and regulations, and had failed to train its employees in CPR and emergency procedures. In addition, the mother asserted state law wrongful death and pain and suffering claims against the Board on a theory of *respondeat superior* based on the alleged negligence of its employees.⁶⁰

The district court, in an unpublished opinion, found that, as a matter of law under § 1983, the defendants did not have a constitutional duty to protect the student, that defendants did not affirmatively place decedent at risk of harm, and that the student's death did not result from a constitutional violation. As to the state law claims, the district court found that Ohio law immunized the school board from liability on the mother's state law claims. The mother appealed the district court's order granting defendants' motion for summary judgment on all of her claims to the Sixth Circuit Court of Appeals.

The Sixth Circuit in *Sargi*, in upholding the district court's summary judgment, found that the mother had failed to produce evidence of causation that the death of the student had

60. The Sixth Circuit upheld summary judgment for the school district on the state tort claims because state statutes did not impose a private cause of action where a school bus lacked certain equipment nor did plaintiffs prove that the conduct of the bus driver or the school district rose to the level of "wanton and reckless" conduct. *Id.* at 913.

resulted from a special relationship, the school board's custom or practice of not adequately training its bus drivers, or a state-created danger. Citing federal appeals court decisions representing other jurisdictions,⁶¹ the Sixth Circuit observed that compulsory attendance would not, in itself, create a special relationship requiring the school district to act in a manner to protect a student with a disability. Even if the State of Ohio had created a duty of care under state law to protect students, the Sixth Circuit noted that "not all state created duties of care create a constitutional duty of care and protection."⁶² As to the student's medical condition and the school district's knowledge of that condition, the Sixth Circuit found no special relationship between the [student] and the school because "a special relationship can only arise when the *state* restrains an individual. Decedent's medical condition and its debilitating effects, however, were not restrictions imposed or created by the state."⁶³

As to the mother's claim that the school board had adopted and maintained a practice, policy, or custom of reckless indifference to instances of children having seizures on school buses, and that the policy had directly caused the constitutional deprivation of the student's life, the Sixth Circuit held that "there [was] no evidence that the Board affirmatively adopted a custom, practice, or policy of taking children suffering from seizures home without medical intervention."⁶⁴ Nor had the mother presented evidence that the school board had adopted a custom, practice, or policy of preventing school bus drivers from obtaining medical assistance for children suffering from seizures or that the board's alleged failure to train its employees rose to the level of deliberate indifference.⁶⁵ Deliberate indifference requires more "than a failure to recognize [a] high risk of harm."⁶⁶

Finally, the Sixth Circuit rejected the plaintiff's claims that the school district had created the danger that resulted in the student's death by:

61. *See id.* at 911, citing to cases from other federal circuits.

62. *Id.*

63. *Id.*

64. *Id.* at 912.

65. *Id.*

66. *Id.*, citing to *Black v. Indiana Area Sch. Dist.*, 985 F.2d 707, 712-13 (3d Cir. 1993).

(1) failing to provide bus drivers with a plan or policy concerning the management of emergencies on its buses; (2) instituting a policy of taking seizure victims home without any emergency medical intervention; (3) failing to maintain properly working communications devices on the bus; and (4) failing to communicate decedent's medical condition to her school bus driver.⁶⁷

In essence, the court of appeals found "no evidence that the Board [had taken] any *affirmative* action that exposed decedent to any danger to which she was not already exposed."⁶⁸

Satisfying the federal courts' burden of proof requirements is equally daunting for all student plaintiffs whether or not they have disabilities.⁶⁹ A finding of negligence under state tort law would not satisfy the section 1983 deliberate indifference standard, but it is far from clear that even gross negligence would meet that standard in the absence of establishing one or more of the three causation factors discussed in *Sargi*. Just as every constitutional violation does not constitute a common law tort, not every injury inflicted by a government official in violation of the common law rises to a constitutional violation⁷⁰ for the simple reason that "[o]rdinary tort law aims at the private distribution of loss [while] [c]onstitutional tort law . . . involves the public distribution of rights and obligations."⁷¹ Thus, although constitutional torts remain a popular theory for litigation by students with, or without, disabilities, "the public distribution of rights and obligations" does not become quite as vital for students with disabilities where they also possess significant statutory rights under the IDEA, § 504, and ADA.⁷²

67. *Id.*

68. *Id.* at 913.

69. See *Parker v. Fayette County Pub. Schs.*, No. 08-5244, 2009 WL 1443706 (6th Cir. 2009) (the Sixth Circuit followed its earlier *Sargi* decision and found no Liberty Clause violation of a right to bodily integrity where an autistic student, who had run away from school and was later found covered with mud and without his clothes, was determined not to have suffered an injury compensable under section 1983 where "there [was] no evidence of any trauma or injury, physical or otherwise.").

70. *Parratt v. Taylor*, 451 U.S. 527, 544 (1981).

71. Gary S. Gildin, *Allocating Damages Caused by Violation of the Charter: The Relevance of American Constitutional Remedies Jurisprudence*, 24 NAT'L J. CONST. L. 121, 134 (2009).

72. See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 443 (1985). With reference to § 504 and IDEA, the Supreme Court, in assigning only a rational purpose test to mental impairment under the Equal Protection Clause, reasoned that the distinctive legislative response, both national and state, to the plight of those who are mentally retarded demonstrates not only that they have unique problems,

III. PROTECTING BOTH STUDENTS WITH DISABILITIES AND REGULAR STUDENTS FROM HARM

A. Protecting Students with Disabilities

One of the effects of inclusion under the IDEA is that among special education students brought into regular education settings are those whose disabilities cause them to be more susceptible to injury. To what standard of care should school personnel be held in protecting such students and what should be the measure of liability where IDEA services are provided in an inappropriate manner?

In *Brooks v. St. Tammany Parish School Board*,⁷³ a mentally impaired student, with an I.Q. of 56, a mental age of 6 years and a motor skill development of a child of 4 years, 2 months,⁷⁴ had been knocked down by two other junior high students engaged in horseplay near a concession stand on school property, resulting in 25% permanent disability to plaintiff Brooks' left leg. The school had permitted its special education students to eat lunch with regular students and to walk on the school grounds when finished. On the day that the student was injured, four teachers were on duty near the place where the injury occurred.⁷⁵

but also that the lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary... The Federal Government has not only outlawed discrimination against the mentally retarded in federally funded programs [§ 504] ... [but] has conditioned federal education funds on a State's assurance that retarded children will enjoy an education that, 'to the maximum extent appropriate,' is integrated with that of nonmentally retarded children [IDEA]).

For an example of a statutory protection under § 504 and ADA not available to nondisabled students, see *Dennin v. Conn. Interscholastic Athletic Conf., Inc.*, 94 F.3d 96 [111 Ed. Law Rep. [1154] (2d Cir. 1996) (although dismissing § 504 as moot, Second Circuit recognized that a nineteen-year-old Down Syndrome student who had a provision for athletic participation in his IEP but who had reached his 19th birthday prior to his senior year, and, thus was ineligible under state athletic association rules to participate in interscholastic sports, had been entitled to the preliminary injunction issued by a federal district court under § 504 and ADA permitting him to participate on the swimming team, the district court reasoning that the association had discriminated against the disabled student by not waiving the rule for him.).

73. 510 So.2d 51 (La. Ct. App. 1987).

74. *Id.* at 53, 54.

75. The ratio of teachers to students on the day of the injury is not stated, but the

The basis for the parents' claim against the junior high school under an ordinary negligence theory was that it should have provided a one-on-one aide, even though the student's IEP had not required one. The trial court found the school district liable because an unreasonable risk of harm had been created by permitting a student with poor balance to travel alone near a concession stand where horseplay among regular education students was common.⁷⁶

Reversing a \$60,000 judgment for the student, a state appeals court, in finding that the school had not been negligent, identified two factors that were controlling in its decision. First, the student's IEP had not required a one-on-one aide, nor had the parents requested one in the IEP conferences. Second, given the IDEA's emphasis on mainstreaming, the student did not fit into a category of students who required total segregation, that is, those who were "severely impaired and who [had] limited or no motor skills and no language ability."⁷⁷ In other words, the school district was not going to be held to a standard of care to provide a service that the parents had said was unnecessary.

However, the nature of the disability and the nature of the school activity can alter liability. In *Greider v. Shawnee Mission Unified School*,⁷⁸ an IEP provided that a student with a behavioral disability be enrolled in a woodworking class. While in the class, the student was injured using a table saw. The student's parents sued the school district, alleging among other counts that the school had "place[d] him in the class despite his behavioral disturbance" and had "fail[ed] to properly notify [the woodworking teacher] of his enrollment in the class and his particular needs."⁷⁹ The school district's defense was that it was entitled to qualified immunity under the state's Tort Claims Act⁸⁰ on the grounds that its supervision of student safety and reasonable protection of students was a discretionary function. In denying the district's motion for summary judgment, the court not only held that schools and teachers had a duty of supervision and instruction

ratio varied from 5:120 to 10:600. *Id.*

76. *Id.* at 51.

77. *Id.* at 54.

78. 710 F. Supp. 296 (D. Kan. 1989).

79. *Id.* at 297.

80. KAN. STAT. ANN. § 75-6104.

to students in general, but more specifically they owed a special duty to students with disabilities.⁸¹ The court observed that the school had a duty under the IDEA to notify the teacher of the student's needs and problems⁸² and the teacher had a duty to instruct the student in operating power tools, "despite his behavioral disorder."⁸³

A similar result was reached in *Guidry v. Rapides School Board*⁸⁴ where parents of a mentally impaired female student sued a school district for negligence after their daughter had been sexually assaulted by a mentally impaired male student. The assault had occurred in a common area to which the students had access after their morning break and which was visually accessible from an adjoining teacher's lounge, except for a small part hidden by a partition. The supervisory teacher, who had gone to the teacher's lounge for a smoke break, upon noticing the absence of two boys promptly returned to the common area to find one of the boys kneeling over the girl. Although the parents could not prove sexual intercourse, the girl nonetheless had suffered considerable psychological harm. In upholding a \$16,000 damages award for the parents, the court observed that "schools offering training for mentally, emotionally, or socially handicapped young people have a duty to use reasonable care to protect their students from harm."⁸⁵

Moreover, this reasonable care encompassed "the risk of sexual behavior by students whose bodies have developed beyond their mental ability to understand or control their urges."⁸⁶ In *Guidry*, the teacher's knowledge that the students required "constant supervision" determined the standard of care and, thus, failure to provide that level of supervision constituted a breach of duty.⁸⁷

School districts are obligated under the IDEA to provide whatever services are necessary for a student to achieve a meaningful educational benefit. What is the measure of

81. *Greider*, 710 F.Supp. at 299.

82. 34 C.F.R. § 300.323(d)(2). Each LEA must ensure that "Each teacher ... is informed of - (i) His or her specific responsibilities, related to implementing the child's IEP; and (ii) The specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP."

83. *Greider*, 710 F. Supp. at 297.

84. 560 So.2d 125 [60 Ed. Law Rep. [262] (La. Ct. App. 1990).

85. *Id.* at 127.

86. *Id.* at 128.

87. *Id.*

liability where a student injury occurs from either inappropriate design for services or ineffective implementation of that design?

In *Greening v. School District of Millard*,⁸⁸ a state-licensed physical therapist (PT) and occupational therapist (OT) employed by the State of Nebraska Services for Crippled Children designed a series of exercises for the plaintiff student who had been born with a congenital deformity (myelodysplasia) that left him unable to ambulate, eventually resulting in osteoporosis, and a weakening of the bones in his legs. Neither the PT nor OT had time to work with the student so the school district where the student attended elementary school hired an aide to assist the student with the exercises. During one session, when the student complained of a popping sound, the aide failed to respond and continued the exercises. Later that day, X-rays showed that the student had a leg fracture. The state supreme court upheld lower court decisions finding no liability for the school district because the district could not be vicariously liable for an exercise program designed by persons who were not their employees.⁸⁹ As to school district's responsibility for its aide, who was not licensed as either a PT or OT, in assisting the plaintiff to perform the exercises the supreme court noted that,

[t]o impose liability on an employer for negligently entrusting work to an employee incompetent to perform such work, a plaintiff must not only show that the employer negligently selected a person incapable of performing the work but also show that the conduct of the incompetent employee was a proximate cause of injury to another.⁹⁰

Since the physicians who testified at trial indicated that the aide had neither incorrectly or incompetently supervised or conducted the exercise regimen nor caused the student's injury, negligence could not be predicated on the aide's lack of training in PT. In the absence of evidence that the aide "knew the

88. 393 N.W.2d 51 [34 Ed. Law Rep. [1199] (Neb. 1986).

89. *Id.* at 59.

The district was entitled to rely upon the competence of a professional therapist, licensed, paid, and supplied by the state. To hold otherwise would require a school district to independently verify the safety of a program developed by a professional who is entrusted by the state with the responsibility of carrying out such program. Under the facts of this case, we decline to impose such duty on the school district.

90. *Id.* at 58.

potential medical danger associated with the exercises,”⁹¹ the supreme court refused to impute the aide’s lack of knowledge to the school district. However, the court cautioned that,

[A person may] be engaged in an activity, or stand in a relation to others, which imposes upon him an obligation to investigate and find out, so that the person becomes liable not so much for being ignorant as for remaining ignorant; and this obligation may require a person to know at least enough to conduct an intelligent inquiry as to what he does not know.⁹²

The school district escaped negligence vicarious liability because the supreme court was not willing to “conclude that the orders or directions given by any therapist to [the aide] were so obviously improper, thereby requiring [the aide] to disregard and refuse to carry out those directions, or, at least, make further inquiry regarding correctness of any order or direction given.”⁹³

What is patently clear from *Greening* is that liability can be premised on both the design and implementation of special education services. The task of an IEP team is to design an IEP for each student with disabilities who qualifies for special education, identifying services that each student is to receive.⁹⁴ The expectation is that each IEP team will include personnel familiar with the services specified in the IEP⁹⁵ and, in any case, either the school district or parents can include “other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate.”⁹⁶ What is clear from the IDEA and accompanying litigation is that liability can be based on failure to have knowledgeable personnel on the IEP team, as well as failure to have appropriately trained persons implementing the IEP.

91. *Id.* at 59.

92. *Id.* quoting from PROSSER AND KEETON ON THE LAW OF TORTS, *Negligence: Standard of Conduct* § 32 at 185 (5th ed. 1984).

93. *Id.*

94. See 20 U.S.C. § 1436(d) for the list of requirements for an IEP.

95. For the minimum individuals required for an IEP team see 20 U.S.C. § 1414 (d)(1)(B)(i)-(vii).

96. 20 U.S.C. § 1414 (d)(1)(B)(vi).

B. Protection of Persons from Injury by Students with Disabilities

Students with disabilities, particularly those with emotional disorders, can represent a risk of injury to other students, as well as school personnel. To what standard should school districts be held in protecting other persons in the school from injury inflicted by special education students with emotional disorder disabilities?

Where injuries have been occasioned by special education students, some courts have made an effort to connect the nature of the disability to the common law tort liability standard of care. In *Collins v. School Board of Broward County*,⁹⁷ a state appeals court upheld a jury verdict for a student in a shop class who had been sexually assaulted by an emotionally handicapped student. Since the assaultive student was in the shop class by virtue of his IEP, the court found that the duty of a teacher to supervise students is greater where regular and emotionally handicapped students are included in the same classroom. In response to the school district's claim that it should not be liable for the intentional sexual misconduct of a student, the court noted that the assault by this student was foreseeable, given the student's past history of sexually aggressive conduct, including exposing himself and fondling other students.⁹⁸

Students with emotional and behavioral disabilities can present risk of injury to employees as well as students. In *Brady v. Board of Education of City of New York*,⁹⁹ a teacher was injured when she intervened to prevent an assault by one student of another. She sued the school district, on the theory that the district knew of the assaultive student's violent propensities and had failed to remove him from the school. A state appeals court upheld summary judgment for the district under governmental immunity, because a decision whether to permit a student to stay in school was discretionary in nature. As the court observed, "pupil placement is a matter of

97. 471 So.2d 560 (Fla. Dist. Ct. App. 1985).

98. Even though school officials had twice suspended the student for his behaviors, this discipline, rather than demonstrating that the school had addressed the behaviors, indicated that officials were aware of the behaviors and should, therefore, be responsible for a higher level of supervision in the classroom. *Id.* at 564.

99. 602 N.Y.S.2d 892 (N.Y. App. Div. 1993).

educational policy, the responsibility for which lies within the professional judgment and discretion of those charged with the administration of the public schools.”¹⁰⁰ However, the court suggested that the district would lose its immunity if it owed a special duty to teachers to protect them from assaults. Although not specified by the court, this special duty could probably be created by a variety of means—a state statute, language in a collective bargaining agreement, or oral promises from administrators. The court in *Brady* (in the absence of a special duty) had not needed to address the issue of standard of care. The IDEA requires that behavioral interventions be included in a student’s IEP where the child’s misbehavior is impeding learning,¹⁰¹ but leaves open the question whether a school district can be liable under a reasonable person standard of care for failing to include appropriate measures to address a special education student’s misbehavior.

In *Collins*, discussed above, the assault by a student with a past pattern of aggressive behavior had occurred during a ten-minute span of time when a substitute teacher was absent from the classroom. Although the case is silent regarding the substitute teacher’s knowledge about the assaultive student, the court was clear that the presence of the emotionally disabled student presented a different risk that had not been addressed. Combining *Greider* and *Collins*, a school’s duty to inform classroom teachers about the problems and needs of emotionally/behaviorally disabled students can affect the standard of care.

However, a tort standard of care may not be relevant if a state has created a different, higher standard. In *Vallandigham v. Clover Park School District*,¹⁰² a teacher and paraprofessional, who had received, over the period of two school years, 140-150 injuries (teacher) and 40-50 injuries (paraprofessional)¹⁰³ from a 12-year-old autistic child with a

100. *Id.* at 893.

101. For example, see 34 C.F.R. § 300.324(a)(2) where an IEP team must consider “positive behavioral interventions, strategies, and supports” and include them in the IEP if a child’s misbehavior is impeding learning. For students with a disciplinary change of placement or who have been removed for more than 10 days, a BIP must be initiated with 10 school days, preceded by a functional behavioral assessment. For students with a BIP, it must be reviewed by the IEP team within 10 school days of the change in placement and modifications made as necessary.

102. 109 P.3d 805, 806 [197 Ed. Law Rep. [397] (Wash. 2005)].

103. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 79 P.3d 18, 22 (Wash. Ct.

behavior disorder, sought recovery for damages under the Industrial Insurance Act's deliberate intention to injury exception to the exclusive provision of the Act.¹⁰⁴ Even though the court found that the student's IEP reported repeated aggressive episodes sufficient to create actual knowledge by the school district that the student's conduct would produce injury, the school district was not liable because it had not willfully disregarded its knowledge of the certain injury. In upholding summary judgment for the school district, a Washington court of appeals held that the following responses by the school district demonstrated that the district had not willfully disregarded injuries imposed upon plaintiffs and other staff members:

1. contacted [the student's] doctor about the change in medication;
2. performed a functional behavior analysis to determine the cause of [the student's] behavior;
3. continued documenting [the student's] behavior;
4. called an IEP meeting to discuss [the student];
5. assigned a temporary aide to work directly with [the student];
6. hired a permanent one-on-one aide to work directly with [the student];
7. created a separate area outside the classroom for use as an isolation or time-out space;
8. offered restraint training and issued walkie-talkies to selected staff;
9. sent staff to observe [the student] at the Frances Haddon Morgan Center, where he had been placed for observation and

App. 2003) (seven other employees also received injuries during the two years ranging from one to fifteen in number).

104. Wash. Rev. Code § 51.24.020. This statute creates an exception to no employer liability for job-related injuries where conduct causing an employee's injury satisfies the standard of "deliberate intention:

If injury results to a worker from the deliberate intention of his or her employer to produce such injury, the worker or beneficiary of the worker shall have the privilege to take under this title and also have cause of action against the employer as if this title had not been enacted for any damages in excess of compensation and benefits paid or payable under this title.

assessment, to discuss placement, intervention, and behavioral issues;

10. placed [the student] in a half-day program;

11. staff from the Center visited the District to discuss [the student] and his placement;

12. considered alternative placements for [the student], but declined these alternatives because they were inappropriate or unwilling to take [the student].¹⁰⁵

A school's duty to protect can extend to members of the public. In *Thomas v. City Lights*,¹⁰⁶ the plaintiff, a member of the public, was assaulted at the National Zoological Park (the zoo) at Washington D.C. by five students with behavioral disorders. All five students were enrolled in City Lights, a private, nonprofit school organized under District of Columbia law for at-risk students, and were on a school field trip at the zoo when the attack occurred. In denying the school's motion for summary judgment, a District of Columbia federal district court held that school owed a duty to supervise its students to prevent foreseeable harm from occurring to members of the public while on a field trip. The district court predicated possible liability under § 316 of the second edition of the Restatement of Torts that, "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm."¹⁰⁷ Applying this provision, the court reasoned that the school could be liable if it "(1) took charge of the five students within the meaning of § 316, (2) if the five students were likely to cause bodily harm to others if not controlled, and (3) if City Lights knew or should have known of the students' propensity to cause bodily harm."¹⁰⁸

Although *Thomas* discusses neither the IDEA nor IEPs, City Lights was operated for "at risk children ages twelve to twenty-two years of age."¹⁰⁹ To the extent that some or all of

105. *Vallandigham*, 109 P.3d at 24.

106. 124 F.Supp.2d 707 (D.D.C. 2000).

107. American Law Institute, RESTATEMENT (SECOND) OF TORTS § 319 (1965).

108. *Thomas*, 124 F.Supp.2d at 712.

109. *Id.* See 20 U.S.C.A. § 1412(a)(1)(B).where the upper range of responsibility for students under the IDEA is a student's 22d birthday.

the students at City Lights had been placed there pursuant to the IDEA, *Thomas* indicates that a school's duty under tort liability can exist apart from its responsibility under the IDEA. The troublesome aspect of *Thomas*, to distinguish it from other cases involving injuries to employees or other students, is that members of the public are unlikely to have any knowledge of the risks posed by the behaviors of some students with disabilities and, thus, the Restatement of Torts' effort to shift responsibility to those in the school who have such knowledge, arguably, seems appropriate.

School districts have the responsibilities both to implement the IDEA and to protect students, school employees, and members of the public. In terms of school employees and students, one approach might be applying a reasonable person test to school officials' responses to complaints about disabled students' conduct. The reasonableness could be twofold: reasonableness in reconvening an IEP team to address such complaints; and reasonableness in providing services to address the objectionable conduct, which could include using the due process hearing route to require services, even if not desired by parents.

IEPs, arguably, are effective only so far as school personnel who work with emotionally/behaviorally disabled students are aware of their provisions. To the extent that an IEP should be important (if not determinative) in defining standard of care, how should a school district's responsibility to communicate information to school personnel affect that standard of care? The IDEA follows the Family Educational Rights and Privacy Act (FERPA)¹¹⁰ in providing access to "education records" without parental consent to those persons with "legitimate educational interests,"¹¹¹ a right of access that normally would include all school personnel working with a student with a behavioral disability. However, the FERPA does not permit providing information about a person's disability to members of the public.

Determining the appropriate standard of care for emotionally/behaviorally disabled students is difficult because there is not an easy fit with other areas of tort liability. The perception by regular education students, parents of such

110. 20 U.S.C. § 1232f; 34 C.F.R. §§ 99.3-99.67.

111. 34 C.F.R. § 99.31(a)(1).

students, and teachers that emotionally/behaviorally disabled students are dangerous may result in demands to remove these students from the classrooms.¹¹² In cases involving students in general, if a student/parent/teacher complaint involved dangerous power equipment, the standard of care would be commensurate with the risk represented, including heightened requirements for instruction and supervision, or possibly, making the equipment inaccessible to students.¹¹³ Would the same characterization work for emotionally/behaviorally disabled students? Would treating such students as if they were a dangerous power saw fly in the face of the IDEA's purpose to dignify special education students by "ensur[ing] that all children with disabilities have available to them a free appropriate public education that emphasizes related services designed to meet their unique needs and prepare them for employment and independent living"?¹¹⁴ Courts face a challenge in addressing an appropriate tort liability standard for students with disabilities (and especially those with emotional/behavioral disabilities) in that a standard of care, if it is to honor the requirements of the IDEA, must be established that does not demean, degrade, and prejudge these special education students by placing them in the same categories as dangerous objects, activities, or places.¹¹⁵

112. See e.g., *Ross v. Maumee City Schs.*, 658 N.E.2d 800, 803 (Ohio Ct. App. 1995) where a violent student's removal from a multi-handicapped unit followed a meeting with parents of other students in the unit and a threatened lawsuit by parents of an injured child.

113. See e.g., *Fontenot v. State Dep't of Educ.*, 635 So.2d 627 (La. Ct. App. 1994) (special education student who severely lacerated his hand while adjusting the guide fence on a power saw when the blade was turning lost in negligence suit where instructor had been in classroom during injury, where student had not been required to have individual supervision, and where the instructor's instructions about adjusting the blade had been adequate).

114. 34 C.F.R. § 300.1(a).

115. The inherent danger argument is prevalent in products liability where it is used to present a claim for strict liability without the need to produce evidence of negligence or willful conduct. See e.g., *Fallon v. Indian Trail Sch.*, 500 N.E.2d 101 [35 Ed. Law Rep. [1205] (Ill. App. Ct. 1986)] (rejecting claim that trampoline was intrinsically dangerous so as to create strict liability for injuries that occurred while using it and rejecting claim of negligent hiring as to whether PE teacher was qualified, the appeals court observing that liability for negligent hiring arises only when particular unfitness of applicant creates danger of harm to third person which employer knew, or should have known, when he hired and placed applicant in employment where he could injure others).

IV. CONCLUSION AND RECOMMENDATIONS

The contractual nature of an IEP creates difficulties in defining the standard of care for school districts that may face litigation under a tort liability claim for injury to, or at the hands of, special education students.¹¹⁶ Should districts be limited in their standard of care to what they have committed to do under an IEP? Clearly, a district's responsibility for the safety of regular education students is defined, at the least, by the ordinary standard of care under negligence, and possibly a heightened standard for the higher risk level of dangerous objects, activities, or places. Regular education students, however, do not negotiate IEPs under the IDEA with school districts.

The choice as to how to resolve liability issues resulting from the interaction of the IDEA and tort liability is not an easy one. Although school officials may want to remove an aggressive student from a regular educational setting, they are constrained by the LRE requirements of the IDEA. To subject those officials to the risk of tort liability, after they have selected a less restrictive environment and another student is injured, would arguably serve to undercut the purpose of the IDEA's LRE requirement. One approach would be that the standard of care for school districts should be measured solely by the timeliness and appropriateness of their actions under the IDEA in reconvening an IEP team, assessing a student's IEP, and designing behavioral modifications. Increasing the standard for tort liability for placement decisions would likely result in increased use of due process hearings by school districts in the hope that administrative or court decisions upholding placement decisions would block tort claims where, at the heart of an injured party's claim, is a question regarding the reasonableness of a placement decision that brought a student with behavioral disabilities in contact with other students.

Special education students are unique in that they have services and review processes available to them that regular education students do not. To limit school district liability for

116. See *Graham v. West Babylon Union Free Sch. Dist.*, 692 N.Y.S.2d 460 [136 Ed. Law Rep. [1012] (N.Y. App. Div. 1999) (student assaulted by another student was entitled to unseal the assaulting student's disciplinary file to discover any past instances of violent and assaultive behavior)].

the injury to, or an injury caused by, special education students resulting from compliance with an IEP creates, one could argue, the appearance of two different standards for measuring student safety. In essence, school districts could be shielded from tort liability as long as they comply with the IDEA, while no such shield would exist for claims that do not involve students with disabilities. Perhaps, the best that can be said is that, because of the public policy significance of addressing the needs of special education students under the current affirmative obligation statute (IDEA), our society may have to live with a certain measure of legal inconsistency.

The lack of clarity as to how the requirements of the IDEA affect tort liability under state or constitutional tort theories should prompt school officials to take several preemptive steps. First, school districts need to communicate to all public education personnel who work with special education students that the provision of services in a student's IEP can be the basis for liability claims, not only for reimbursement and compensatory damages under the IDEA,¹¹⁷ but also for damages under a state or constitutional tort liability theory. Second, school districts need to check their district liability policies to assure that their personnel who work with students with disabilities are covered for student-related injuries, even those involving gross negligence or willful conduct. Third, employees need to be advised that they should consider personal insurance protection, such as that provided by professional organizations, where they may be individually liable for injuries related to students with disabilities. Fourth, although not addressed in law cases discussed in this article, school officials may want to consider whether volunteers and chaperones who often accompany students on school trips should receive some measure of instruction concerning students with special needs. Very little litigation involves questions regarding the adequacy of supervision of volunteers or chaperones,¹¹⁸ but the best interest of students in general

117. See *Forest Grove School District v. T.A.*, 129 S.Ct. 2484 (2009) (upholding reimbursement of tuition cost for unilateral parent placement where school district had failed to provide FAPE). See also, *Mary T. v. School District of Philadelphia*, 575 F.3d 235, (3d Cir. 2009) (relying on *Forest Grove* to find no claim for reimbursement or compensatory damages as a result of parent private school placement).

118. See *Robinson v. Jefferson Parish Sch. Bd.*, 9 So.3d 1035 (La. Ct. App. 2009) (in a case not involving a special education student, the court found no negligence where student's death on a field trip was not caused by school district's lack of a policy

(and special education students in particular) would seem served by providing those volunteers and chaperones with sufficient information to protect the students on field trips from foreseeable risks.¹¹⁹

on training chaperones).

119. See generally, Jeffrey L. Brudney, *The Effective Use of Volunteers: Best Practices for the Public Sector*, 62-AUT LAW & CONTEMP. PROBS. 219 (1999) (discussing at some length the extensive use that public schools make of volunteers in tutoring, working in school programs, and in field trips).